



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CIVIL SUIT NO. 10 OF 2017**

**ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GEOTECH CONTRACTORS LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SERAH MUSYIMI.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**ANDREW KOMBE.....3<sup>RD</sup> DEFENDANT**

**SAMUEL KOMBE NGARI.....4<sup>TH</sup> DEFENDANT**

**EQUITY BANK KENYA LIMITED.....5<sup>TH</sup> DEFENDANT**

**ABEL BAHATI KITSAO.....6<sup>TH</sup> DEFENDANT**

**ROBERT MWAMUNYE JILLANI.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. On 11<sup>th</sup> May 2017, this court issued an injunction to refrain the defendants by themselves or through their agents, servants or assigns from transferring, disposing off, wasting or in any way dealing with the said account including a sum of Kshs. 22,305,363.95/= in the bank Account No. 1290264840913 in the name of Geotech Contractors Limited held at Equity Bank Limited, Malindi Branch, pending hearing and determination of the Plaintiff's suit.

2. On 10<sup>th</sup> July, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants advocate filed a Notice of Motion under certificate of urgency under order 44(1) (a) seeking an order of review of the Order made on 11<sup>th</sup> May, 2017 and do order the release of the sum of Kshs. 22,305,363.95 to the 1<sup>st</sup> Defendant, among others.

3. The above application is supported by the supporting affidavit of SerahmMusyimi the 2<sup>nd</sup> defendant. She avers that when the above orders of preservation were granted by the court, the Plaintiff/Respondent failed to disclose to the court that at the time it was presenting the application the 1<sup>st</sup> Defendant had actually executed the contract and the project had been completed and handed over to the owners being the County Government of Kilifi.

4. She further averred that the Plaintiff had filed a report Engineer JuliusmWangai who inspected the works and confirmed that the project (SM3) was indeed executed and completed. She contended that in as much as she did not fully agree with all the findings by the Engineer, the only amount in dispute is Kshs. 8, 491,348/- and the sum of Kshs. 27,303,893/- ought to be paid to the 1<sup>st</sup> Defendant.

5. It was on this basis that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were asking themCourt to review its decision made on 11<sup>th</sup> May 2017 and order that the sum of Kshs. 22,305,363.95 be released to the 1<sup>st</sup> Defendant. She contended that any further withholding of the money was not justified since the contract had been executed and was being enjoyed by the County of Kilifi.

6. The application was opposed by the Plaintiff/Respondent vide their replying affidavit dated 18<sup>th</sup> July, 2018 sworn by Tabu Lwanga an investigator with the Plaintiff. He averred that the 1<sup>st</sup> Defendant has two directors namely the 2<sup>nd</sup> Defendant and one Charity Mueni Musyimi. That the said Charity Mueni Musyimi has not given authority to the 2<sup>nd</sup> Defendant to swear an affidavit in support of the instant

application in violation of Order 1 rule 13 of the Civil Procedure Rules 2010. At the same time he stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had moved the court under the wrong provision of the law being Order 44(1)(a) of the Civil Procedure Rules.

7. **Tabu Lwanga** further averred that they lodged an investigation on allegations of procurement and fraudulent acquisition of public funds pursuant to Tender No. 181117-201572016 for construction of Kadzandani-Kamale water project in Magarini Sub County by the County Government of Kilifi. He stated that as a result of the said investigation the Plaintiff was satisfied that the 1<sup>st</sup> Defendant/Applicant did not fairly win the tender due to fraud in the procurement process. Further that the 1<sup>st</sup> Defendant/Applicant had used false tender documents to win the tender. That the money paid to it was fraudulently so paid.

8. Thus, the Plaintiff filed a suit (TL2) seeking orders among them a pecuniary claim of Kshs. 22,305,240.00/=being the whole amount that was paid to the 1<sup>ST</sup> Defendant and simultaneously moved to preserve the said funds in the 1<sup>st</sup> Defendants bank account pursuant to section 56 of the Anti-Corruption and Economic Crimes Act and Order 40 of the Civil Procedure Rules 2010. The Orders were granted on 11<sup>th</sup> May 2017.

9. The 2<sup>nd</sup> defendant filed a further affidavit dated 25<sup>th</sup> July 2018 and attached a Board Resolution(A) dated 31<sup>st</sup> August 2015 dispensing the Plaintiff's averment that she had no authority to swear the affidavit attached to the present application.

10. When the above matter came before me, Mr. Mogeni for the Applicant submitted that the works having been valued, the project completed, handing over done, and project being in use, all amounted to a benefit already accrued. Counsel further submitted that the project was valued at Kshs. 33 million and no single shilling had been received by the 1<sup>st</sup> Defendant yet the 5<sup>th</sup> Defendant continued to hold the Kshs 22 million.

11. Counsel contended that the directors of the 1<sup>st</sup> defendant are young women and there is no reason why the Kshs. 22 million should be held any further as the proceeds of the contract are in use. It was his submission that on a balance of probability, the court should review its order of 11<sup>th</sup> May 2017.

12. Mr. Mbaka for the plaintiff submitted that on 4<sup>th</sup> June 2016, Kshs. 22,335,324/= was paid into the 1<sup>st</sup> Defendants account (Equity Bank Malindi Branch). He further submitted that when the 1<sup>st</sup> Defendant did the bidding, they submitted fake documents and were therefore not lawfully awarded the tender. As a result he said, the award and payment to the 1<sup>st</sup> Defendant were null and void.

13. He further submitted that their suit is in respect of the amount paid; they are not claiming the deficit of Kshs. 8,491,348/- as per the report filed. He argued that the report filed is for the work done and it is not of essence despite the amount claimed. He urged the court not to review the orders as sought.

14. I have considered the application, affidavits and the submissions by both counsel. The issue for determination is whether the applicant has made out a case for grant of the order for review sought.

It is true that orders of injunction have been issued by this Court in this matter pending the full hearing of the suit herein. The said orders were issued under Section 56 of the Anti-Corruption & Economic Crimes Act (ACECA).

15. In the suit filed before this court, the Plaintiff/Respondent is seeking restitution of Kshs.22,305,363.95 to the County Government of Kilifi being the sums paid and received by the 1<sup>st</sup> Defendant/Applicant. Mr. Mogeni in his submission relied on the valuation report filed by the Plaintiff/Respondent and submitted that the 1<sup>st</sup> Defendant/Applicant had actually completed the project and handed it over. The project is therefore in use which is a benefit accrued. That was not disputed by the Plaintiff/Applicant.

16. Order 45 Civil Procedure Rules provides:

**“ Rule 1**

**(1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

**Rule (3)**

**(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.**

**(2) Where the court is of opinion that the application for review should be granted, it shall grant the same.”**

Order 45 Rule 1 (1) (b) Civil Procedure Rules sets out the parameters for an Application for Review. The supposed to be new evidence has been produced in form of valuation reports.

17. There is however another angle to the issue before this court. The Respondent claims that when the 1<sup>st</sup> Defendant/Applicant did the bidding, they submitted false documents, hence, they were not properly awarded the tender. It was thus the Respondent's submission that the award and payment of the 1<sup>st</sup> Defendant were null and void as they did not deserve the payment.

18. According to the Respondent its suit is in respect of the amount paid to the 1<sup>st</sup> Defendant; following a flawed process, in the award of the tender. It is not about the work done.

19. What the Plaintiff/Respondent is raising are serious issues which are contested. If the Plaintiff succeeds in establishing that the 1<sup>st</sup> Defendant presented fake documents then prayer No. (a) and (b) of the plaint will come into play. At this point, the Court would not be in position to state with certainty without parties adducing evidence, that the Plaintiff's claim has any substance or not.

20. What is however clear before the court, is that the 1<sup>st</sup> Defendant applied for a tender No. 181117-2015/2016 for construction of Kadzandani-Kamale Water Project in Magarini Sub-County which tender has raised integrity issues. As a result of the said tenders, the Kilifi County Government paid to the 1<sup>st</sup> Defendant a total of Kshs.22,305,324.45 This is all public funds and the public has a high stake in this matter.

21. The figure cited above is not little money which one can easily brush off and say it can be refunded. It is the duty of the Plaintiff/Respondent to protect the integrity of processes and more so, procurement processes in this country. It is for that reason that this Court in a ruling dated 11<sup>th</sup> May 2017 granted the Plaintiff an injunction refraining the defendants or their agents from transferring or disposing Kshs. 22,305,363.95/= in the 1<sup>st</sup> Defendants Equity Bank Account Malindi Branch pending hearing and determination of the Plaintiff's suit.

22. It will be in the interest of justice that the orders of injunction preserving the money in issue remain in place as directed by the Court. The said orders were issued almost one and a half years ago yet the parties herein are not keen on having the matter heard and determined. The only way out is to expedite the hearing of the main suit.

23. I therefore find that there is no merit in the application dated 10<sup>th</sup> July, 2018. And I dismiss it with costs.

24. Parties to take a mention date for fixing of a hearing date.

Costs in cause.

Orders accordingly.

**Delivered, signed and dated this day 12<sup>th</sup> of October, 2018 in open court at Nairobi.**

.....

**HEDWIG I. ONG'UDI**

**HIGH COURT JUDGE**